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2
3 MARY HELEN BERNSTEIN, et al.,
4

5 Plaintiffs,
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7 v.
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9 UNITED STATES DEPARTMENT OF
10 HOUSING & URBAN DEVELOPMENT,
et al.,

11 Defendants.
12

Case No. 20-cv-02983-JSC

SCREENING ORDER NO. 2

Re: Dkt. No. 77

13 Plaintiffs Mary Helen Bernstein and Elizabeth Grace Tigano, who are proceeding without
14 an attorney, filed this discrimination action against the United States Department of Housing and
15 Urban Development, the California Department of Fair Employment and Housing, and several
16 individual defendants employed by these agencies. The Court previously granted Plaintiffs' in
17 forma pauperis application, reviewed their complaint under 28 U.S.C. § 1915, and concluded that
18 Plaintiffs' complaint failed to state a claim. (Dkt. No. 74.) Plaintiffs thereafter filed the now
19 operative Second Amended Complaint which repleads several of Plaintiffs' claims, adds
20 allegations and claims against several Defendants including the State of California, the Alameda
21 County Superior Court, the Judicial Council of California, and eight Alameda County Superior
22 Court judges and judicial commissioners. (Dkt. No. 77.) For the reasons stated below, the Court
23 concludes that Plaintiffs' SAC is deficient and fails to state a claim.

24 **SECOND AMENDED COMPLAINT ALLEGATIONS**

25 Plaintiffs Mary Bernstein and Elizabeth Tigano are sisters. In their 79-page Second
26 Amended Complaint (SAC), they identify themselves as suffering from numerous disabilities and
27 as survivors of sexual abuse. (Dkt. No. 77 at ¶¶ 1-2.) The SAC describes a lengthy history of
28 issues with the tenants and management of the apartment complex in which Ms. Bernstein lives,

1 Plaintiffs' efforts to seek redress regarding these issues from the United States Department of
2 Housing and Urban Development (HUD), the California Department of Fair Employment and
3 Housing (DFEH), and the Alameda County Superior Court. Ms. Tigano, who lives in Arizona,
4 alleges that she has been impacted by Ms. Bernstein's harassment in California and that she has
5 been harassed in her HUD-affiliated housing project in Arizona. (*Id.* at ¶ 30.)

6 Plaintiffs' SAC repleads many of their allegations regarding HUD and DFEH's failure to
7 take action to protect them from harassment in their respective housing situations. Plaintiffs have
8 filed 9 civil harassment restraining orders as well as complaints with HUD regarding their hostile
9 living environment issues. (*Id.* at ¶¶ 29-33.) At some point, it appears that HUD transferred its
10 investigation to the California Department of Fair Employment and Housing. (*Id.* at ¶ 32.) While
11 Plaintiffs continue to take issue with HUD and DFEH's handling of their complaints, their SAC
12 focuses on the alleged improper actions of the Alameda County Superior Court judges and judicial
13 commissioners handling Plaintiffs' lawsuits regarding Ms. Bernstein's living situation and the
14 harassment she has endured. (*Compare* Dkt. No. 37 *with* Dkt. No. 77.) In particular, Plaintiffs
15 allege that "Defendant Alameda County Superior Court has repeatedly denied and ignored
16 reasonable accommodation requests of Plaintiff Bernstein and witness Elizabeth Tigano," and
17 denied their request for appointment of counsel. (Dkt. No. 77 at ¶ 33.) Plaintiffs allege that
18 "Defendant Paul Herbert Judge has subjected disabled half sisters Plaintiffs Bernstein and Tigano
19 to humiliation, mental anguish on remote hearings November 4, 2020, November 9, 2020 and
20 February 24, 2021" and that "PAUL HERBERT, TARA DESAUTELS, BENTRISH
21 SATARZADEH, JEFFREY BRAND, PATRICK MCKINNEY, PELAYO LLAMAS, TAMIZA
22 HOCKENHULL have denied repeatedly reasonable accommodations submitted with volumes of
23 doctors reports requesting reasonable accommodations for Plaintiff Mary Bernstein." (*Id.*)

24 The SAC includes seven claims for relief: (1) race discrimination in violation of 42 U.S.C.
25 § 1981 as to the HUD/DFEH Defendants; (2) religious discrimination in violation of 42 U.S.C. §
26 1981 as to all Defendants; (3) negligent infliction of emotional distress in violation of Cal. Civ.
27 Code § 3294 as to all Defendants; (4) intentional infliction of emotional distress in violation of
28 Cal. Civ. Code § 3294 as to all Defendants; (5) "NEGLIGENCE INTENTIONAL INFILCTION

1 OF EMOTIONAL DISTRESS RELIGIOUS/RACIAL DISCRIMINATION BY HUD, CAL
2 DFEH/CIVIL RIGHTS VIOLATION UNRUH CIVIL RIGHTS ACT Code Section Civ. §§51, et
3 seq. (Public Accommodations) Gov. §12940 et seq. (Housing & employment)
4 Agency Civ §§51: None; Gov. §12940: Dept. of Fair Employment and Housing" (Dkt. No. 77 at
5 p. 42); (6) disability discrimination in violation of 42 U.S.C. § 12132 as to the State of California
6 Judicial Branch; and (7) disability discrimination in violation of 42 U.S.C. § 12132 as to
7 HUD/DFEH Defendants.

8 As relief, Plaintiffs seek an order finding that (1) by denying them counsel in the state
9 court proceedings, "the Judicial Branch of the California Government and its subdivisions violated
10 the due process rights of Plaintiffs and other indigent litigants with cognitive disabilities"; (2)
11 Plaintiffs' due process rights were violated during "the court processes in Superior Court of
12 Alameda County" and reversing all rulings made in those proceedings; (3) "Judge Paul Herbert of
13 Alameda County Superior Court during the hearings on November 4, 2020 November 9 2020 and
14 February 24 2021 [committed] intentional abuse, torture, and discrimination of cognitively
15 disabled plaintiff Mary Bernstein and subjected cognitively disabled Plaintiff Elizabeth Tigano to
16 traumatic experience;" and (4) Plaintiffs are entitled to damages from all Defendants. (Dkt. No.
17 77 at pp. 75-77.)

18 **LEGAL STANDARD**

19 The Court has a continuing duty to dismiss any case in which a party is proceeding in
20 forma pauperis upon a determination that the case is: (1) frivolous or malicious; (2) fails to state a
21 claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is
22 immune from such relief. *See* 28 U.S.C. § 1915(e)(2). The standard of review under 28 U.S.C. §
23 1915(e)(2) mirrors that of Rule 12(b)(6). *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000).
24 Thus, the complaint must allege "enough facts to state a claim to relief that is plausible on its
25 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facial plausibility standard is not a
26 "probability requirement" but mandates "more than a sheer possibility that a defendant has acted
27 unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations
28 omitted). To avoid dismissal, a complaint must contain more than "naked assertion[s]," "labels

1 and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550
2 U.S. at 555-57. "A claim has facial plausibility when the plaintiff pleads factual content that
3 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
4 alleged." *Iqbal*, 556 U.S. at 678.

5 When a plaintiff files a complaint without being represented by a lawyer, the court must
6 "construe the pleadings liberally ... to afford the petitioner the benefit of any doubt." *Hebbe v.*
7 *Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (internal quotation marks and citation omitted). Upon
8 dismissal, self-represented plaintiffs proceeding in forma pauperis must be given leave "to amend
9 their complaint unless it is absolutely clear that the deficiencies of the complaint could not be
10 cured by amendment." *Franklin v. Murphy*, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984) (internal
11 quotation marks and citation omitted).

12 DISCUSSION

13 There are several issues with Plaintiffs' SAC. While the Court is sympathetic to Plaintiffs'
14 challenging personal situations and the complexities of navigating the legal system without
15 counsel, Plaintiffs' SAC does not comply with Rule 8 and provide a short and plain statement of
16 the factual basis for their claims. *See Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir.
17 1981) (dismissing a 48-page complaint with 23-pages of addenda under Rule 8 as "verbose,
18 confusing and almost entirely conclusory."). While Plaintiffs have reduced the number of claims
19 for relief—from 36 to 7—their allegations are repetitive, confusing, and not tethered to their actual
20 legal claims. *See McHenry v. Renne*, 84 F.3d 1172, 1175 (9th Cir. 1996) (affirming dismissal of
21 complaint which contained "argumentative and prolix allegations" and failed to identify "what
22 constitutional torts [defendants] were accused [of]").

23 In addition, Plaintiffs have failed to plead a claim for relief under any of the seven claims
24 pled here. *First*, with respect to Plaintiffs' claims for race and religious discrimination under 42
25 U.S.C. § 1981, as the Court previously noted, Section 1981 does not protect against religious
26 discrimination. *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1167 n.3 (9th Cir. 2007) ("It is well
27 established, however, that § 1981 does not apply to claims of religious discrimination.") To state
28 a claim for race discrimination under § 1981, a plaintiff must allege facts demonstrating (1) that

1 she is a member of a racial minority; (2) the defendant's intent to discriminate on the basis of race;
2 and (3) that the discrimination concerned one or more of the activities enumerated in the statute.

3 *See Lenk v. Sacks, Ricketts, and Case LLP*, No. 19-cv-03791-BLF, 2020 WL 2793480, at *4 (N.D.
4 Cal. May 29, 2020); *see also Comcast Corp. v. National Assn. of Africa American-Owned Media*,
5 140 S.Ct. 1009, 1019 (2020) ("a plaintiff must initially plead and ultimately prove that, but for
6 race, it would not have suffered the loss of a legally protected right."). Plaintiffs, who allege that
7 they are white women, have not pled a colorable claim under Section 1981. (Dkt. No. 77 at ¶ 42.)

8 **Second**, to state a negligent infliction of emotional distress claim Plaintiffs must plausibly
9 allege "(1) serious emotional distress, (2) actually and proximately caused by (3) wrongful
10 conduct (4) by a defendant who should have foreseen that the conduct would cause such distress."
11 *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004). With respect to this claim, Plaintiffs
12 allege that "Defendant USA" was negligent in supervising its agents and employees and that its
13 "conduct of closing files, denying relief, denying that Plaintiffs were federally protected class
14 extreme and outrageous and done with the intent to cause severe emotional distress." (Dkt. No. 77
15 at ¶¶ 55-56.) However, Plaintiffs have not named the United States of America as a Defendant
16 here. To the extent that these allegations are directed at HUD they are too conclusory to state a
17 claim. *Coleman v. Beard*, No. 14-CV-05508-YGR (PR), 2015 WL 395662, at *4 (N.D. Cal. Jan.
18 29, 2015) ("While the federal rules require brevity in pleading, a complaint nevertheless must be
19 sufficient to give the defendants 'fair notice' of the claim and the 'grounds upon which it rests.'")
20 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). The same is true with respect to Plaintiffs'
21 general allegation that the State of California was negligent in its supervision of employees and
22 denied Plaintiffs their Fourteenth Amendment due process rights. (Dkt. No. 77 at ¶ 58.) Finally,
23 to the extent that Plaintiffs name particular individual employees of HUD or DFEH, Plaintiffs
24 have not alleged serious emotional distress, actually and proximately caused by wrongful conduct
25 of any of these individuals, such that they should have foreseen that the conduct would cause such
26 distress. (*Id.* at ¶¶ 59-69.)

27 **Third**, to the extent that Plaintiffs predicate their claim for intentional infliction of
28 emotional distress on the same basis as their negligent infliction of emotional distress claim, it too

1 appears to fail to state a claim. The elements of a claim for intentional infliction of emotional
2 distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or
3 reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering
4 severe or extreme emotional distress; and (3) actual and proximate causation of the emotional
5 distress by the defendant's outrageous conduct. *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir.
6 2009) (internal citation omitted). Conduct is outrageous if it is so extreme as to exceed all bounds
7 of that usually tolerated in a civilized community. *Id.* at 571. "Liability for intentional infliction of
8 emotional distress does not extend to mere insults, indignities, threats, annoyances, petty
9 oppressions, or other trivialities." *Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009) (internal citation
10 and quotation marks omitted) (concluding that threats that, unless plaintiff granted the defendant
11 sexual favors, he would use his authority as a trustee of the trust set up for plaintiff's son to deny
12 her requests for funds, "fall far short of conduct that is so outrageous" that it exceed[s] all bounds
13 of that usually tolerated in a civilized community.") (internal citation and quotation marks
14 omitted). Plaintiffs have not identified actions which give rise to their intentional infliction of
15 emotional distress claim beyond alleging that HUD and DFEH create a quid pro quo and hostile
16 environment. (Dkt. No. 77 at ¶ 78.)

17 **Fourth**, Plaintiffs' fifth claim for relief repeats the same allegations, although its legal
18 basis is unclear. The claim is captioned: FIFTH CLAIM FOR RELIEF NEGLIGENCE
19 INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS RELIGIOUS/RACIAL
20 DISCRIMINATION BY HUD, CAL DFEH/CIVIL RIGHTS VIOLATION UNRUH CIVIL
21 RIGHTS ACT Code Section Civ. §§51, et seq. (Public Accommodations) Gov. §12940 et seq.
22 (Housing & employment) Agency Civ §§51: None; Gov. §12940: Dept. of Fair Employment and
23 Housing." (Dkt. No. 77 at p. 42.) Because the Court cannot discern the legal claim at issue with
24 this claim—to the extent that it is distinct from the other claims alleged—Plaintiffs' fifth claim for
25 relief likewise fails to state a claim.

26 **Fifth**, Plaintiffs' ADA claim is pled against the "Defendant State of California Judicial
27 Branch," but focuses their allegations against the individual Alameda County Superior Court
28 judges and commissioners as well as the Judicial Council of California. (Dkt. No. 77 at ¶ 87.) To

1 the extent that Plaintiffs challenge actions or rulings taken in their state court action, such a claim
2 may be barred by the *Rooker-Feldman* doctrine. “The *Rooker-Feldman* doctrine prevents the
3 lower federal courts from exercising jurisdiction over cases brought by ‘state-court losers’
4 challenging ‘state-court judgments rendered before the district court proceedings commenced.’”
5 *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus.*
6 *Corp.*, 544 U.S. 280, 284 (2005)). Thus, “[i]f a federal plaintiff asserts as a legal wrong an
7 allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on
8 that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court.” *Noel v.*
9 *Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003). Under the *Rooker-Feldman* doctrine, “[a] federal
10 district court dealing with a suit that is, in part, a forbidden de facto appeal from a judicial decision
11 of a state court must refuse to hear the forbidden appeal [and,] [a]s part of that refusal, it must also
12 refuse to decide any issue raised in the suit that is ‘inextricably intertwined’ with an issue resolved
13 by the state court.” *Noel*, 341 F.3d at 1158. “A claim is inextricably intertwined with a state court
14 judgment if the federal claim succeeds only to the extent that the state court wrongly decided the
15 issues before it, or if the relief requested in the federal action would effectively reverse the state
16 court decision or void its ruling.” *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 992
17 (9th Cir. 2002) (internal quotation marks and citations omitted). “Where the district court must
18 hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to
19 both courts are inextricably intertwined.” *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d
20 1026, 1030 (9th Cir. 2001). Plaintiffs ask the Court here to find that the Alameda County Superior
21 Court erred and asks that this Court reverse its rulings which would be barred by *Rooker-Feldman*.

22 To the extent that Plaintiffs make a reasonable accommodation ADA claim against Judge
23 Herbert, Judge Desautels, Judge Seligman, Commissioner Hockenhull, Judge Brand, Judge
24 McKinney, Commissioner Satarzadeh, and Commissioner Llama, even if these claims are not
25 barred by *Rooker-Feldman*, these Defendants are entitled to judicial immunity for acts done in
26 their official capacity.¹ The doctrine of judicial immunity provides a “complete immunity from

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28 ¹ Title II claims cannot be maintained against state officers in their individual capacities. See
Polley v. Davis, No. 17-CV-03793-JST, 2018 WL 4352958, at *3 (N.D. Cal. Sept. 11, 2018)

1 suit, not just from ultimate assessment of damages.” *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per
2 curiam); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (“Judges and those
3 performing judge-like functions are absolutely immune from damage liability for acts performed
4 in their official capacities.”). Judicial immunity does not apply to (1) “actions not taken in the
5 judge’s judicial capacity” or (2) “actions, though judicial in nature, taken in the complete absence
6 of all jurisdiction.” *Mireles*, 502 U.S. at 11-12. Whether a judge acts in a judicial capacity turns on
7 “the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the
8 expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.” *Id.* at 12
9 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)).

10 Plaintiffs’ allegations here are that Judge Herbert denied Ms. Bernstein’s request for live
11 hearings (rather than telephonic), denied her request for continuances, and denied her request for
12 appointment of counsel. (Dkt. No. 77 at ¶ 87(a)-(c). The Ninth Circuit has identified four factors
13 that indicate an act is performed in the judicial capacity: “(1) the precise act is a normal judicial
14 function; (2) the events occurred in the judge’s chambers; (3) the controversy centered around a
15 case then pending before the judge; and (4) the events at issue arose directly and immediately out
16 of a confrontation with the judge in his or her official capacity.” *Meek v. County of Riverside*, 183
17 F.3d 962, 967 (9th Cir. 1999) (citation omitted). “These factors are to be construed generously in
18 favor of the judge and in light of the policies underlying judicial immunity.” *Ashelman v. Pope*,
19 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc). Judge Herbert’s denial of Plaintiffs’ request for
20 live hearings, for continuances, and for appointment of counsel were part of the exercise of his
21 normal judicial functions for which he is entitled to judicial immunity. *See Duvall v. Cty. of*
22 *Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001), as amended on denial of reh’g (Oct. 11, 2001)
23 (“Ruling on a motion is a normal judicial function, as is exercising control over the courtroom
24 while court is in session.”) Plaintiffs’ allegations against the remaining judges and judicial
25 commissioners likewise appear to be based on actions that these Defendants took while
26 performing normal judicial functions including declining to schedule hearings in the morning as a
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28 (citing *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Alsbrook v. City of Maumelle*, 184
F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc)); 42 U.S.C. § 12132.

1 reasonable accommodation, limiting the amount of oral argument time Plaintiffs were given, and
2 requiring responses to multiple motions/discovery requests at the same time. (Dkt. No. 77 at ¶
3 87(d)-(i).)

4 **Finally**, Plaintiffs' ADA claim against HUD and DFEH fails to state a claim under Title II
5 of the ADA. To plead a Title II claim, a plaintiff must allege : (1) she is a "qualified individual
6 with a disability"; (2) she was either excluded from participation in or denied the benefits of a
7 public entity's services, programs, or activities, or was otherwise discriminated against by the
8 public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of her
9 disability. *Weinreich v. Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th
10 Cir.1997). While Plaintiffs allege that HUD and DFEH officials ignored their complaints and did
11 not assist them in stopping the harassment at their housing complexes, Plaintiffs do not tie these
12 allegations to their disabilities; that is, they do not allege that these actions were taken by HUD or
13 DFEH employees *because of* their disabilities.

14 CONCLUSION

15 For the reasons set forth above, Plaintiffs' SAC fails section 1915 review. Plaintiffs may
16 file a further amended complaint **within 60 days**. Any amended complaint must clearly and
17 succinctly (1) summarize Plaintiffs' factual allegations; (2) identify the legal basis for their claims;
18 and (3) identify which Defendants are named for which claims. If Plaintiffs do not respond to this
19 Order or if their amended complaint fails to state a claim, the Court may prepare a report and
20 recommendation recommending that a district judge dismiss the complaint.

21 **The Court continues to encourage Plaintiffs to seek free assistance from the Northern**
22 **District's Legal Help Center. Due to ongoing COVID concerns, Plaintiffs can make a**
23 **telephone appointment by calling (415) 792-8982.**

24 **IT IS SO ORDERED.**

25 Dated: April 19, 2021

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge